

**IN THE COURT OF SENIOR CIVIL JUDGE AND JMFC AT
HIRIYUR**

Dated this the 12th day of August 2022

Present: SRI MOHAMMED MOINUDDIN, B.A., LL.B., (Spl.)

Senior Civil Judge and JMFC, Hiriya

O.S.11/2015

PARTIES TO I.A.NO.VIII

Applicant : Siddappa

Vs.

Opponent : Chandrappa

ORDERS ON I.A.NO.8

The defendant No.2 and 3 have filed this application U/Sec.151 of CPC to treat the issue No.3 as preliminary issue and heard the matter on said issue and record finding thereon.

2. The defendant No.2 has sworn to the effect that, the defendant No.1 had filed a suit in OS No.19/2002 before the learned Civil Judge Hiriya against him and his mother for partition and separate possession of his share in suit properties. In that suit the applicant had contended that, the propositus of plaintiffs and defendants by name Kariyappa had divided the joint family properties between his two sons Donne Obanna and Kurudu Obanna. After their death the remaining

brothers got divided their ancestral and joint family properties by oral partition.

3. The property fallen to the share of Ajjappa S/o Kariyappa the land bearing Sy.No.106/2 measuring 4 acres 10 gunta has been bequeathed by him by registered will dated 05-11-1977 in favor of applicant's father. Besides, the land measuring 4 acres 20 gunta was allotted to the share of applicant's father. Further the land allotted to the share of Moote Kariyappa @ Kariyanna measuring 4 acres 20 gunta has been bequeathed by him by a registered will in applicant's favor. The land to the extent of 4 acres 20 gunta has been allotted to the share of father of defendant No.1 and grandfather of plaintiff.

4. The suit filed by defendant No.1 in OS No.19/2002 came to be dismissed by judgment and decree dated 05-01-2005. The plaintiff herein is the son of defendant No.1 in collusion with other defendants has filed this frivolous suit with an intention to give trouble to the applicant. Hence, the applicant has submitted that in view of dismissal of earlier suit the instant suit is hit by the principles of res-judicata. As such the applicant has submitted that, the issue No.3 framed by this court purely related to the question of law. As such prayed to treat the same as preliminary issue and heard the matter on that issue first. If

the application is rejected then he will be put to irreparable loss. Hence, the applicant has prayed to allow the application in the interest of justice.

5. The defendant No.1(a) has filed objections whereby admitted dismissal of earlier suit filed by defendant No.1 for the same reliefs. However, this defendant has contended that, in the instant suit the applicant herein in his written statement has admitted some of the plaint averments and denied the other and has made counter claim also. Among the issues and additional issues framed by this court the burden to prove the issue No.2 and 3 is casts upon the defendant No.2 and others upon the plaintiff.

6. The defendant No.1(a) further submitted that, the parties have already led their evidence and 90% of the trial of the suit already completed. Under such circumstances there is no scope to treat the issue No.3 as preliminary issue does not arise. Moreover the application has been filed after lapse of 6 years from the date of framing of issues. As such the application is not maintainable either in law or on facts. Hence, the defendant No.1(a) has prayed to reject the same with cost.

7. The following point arises for determination.

1. Whether the defendant No.2/applicant has satisfied that, the issue No.3 is to be treated as preliminary issue?

8. I have heard the arguments from both sides and perused the available materials. My finding to the above point is in negative for the following:

REASONS

9. POINT No.1:- On perusal of the available materials, it is seen that, the suit in OS No.19/2002 was filed by the defendant No.1 against his brothers and sister. Of course, said suit after contest came to be dismissed by answering the material issue No.1 in negative.

10. The instant suit has been filed by the sons and daughters of defendant No.1 who died during pendency of the suit. In the entire plaint the plaintiffs have not disclosed about dismissal of earlier suit in OS No.19/2002 by their father. No doubt the earlier suit and instant suit are in respect of same properties and for same reliefs. It is an admitted fact that, the plaintiffs are claiming their rights through their father i.e., deceased defendant No.1. Further it is an admitted fact that, the finding recorded in earlier suit has reached finality.

Indisputably the issue No.1 of this suit and issue No.1 of earlier suit are identical and as per provisions of section 11 of CPC the trial of an issue in a subsequent suit which is identical in earlier suit has been barred. However, the records of this suit suggest that, the issues were framed by this court 08-01-2016 and thereafter the plaintiffs have led their side evidence got marked several documents in support of their case. The defendant No.1(a) has also led oral evidence as DW-1 and she has been cross examined by the learned counsels for other defendants except the learned counsel for defendant No.2 and 3. The records further suggest that, the defendant No.2 and 3 on 16-06-2022 after taking adjournment for cross examination on their behalf have filed this application on 04-07-2022 to treat the issue No.3 as preliminary issue and heard it first regarding maintainability of the suit.

11. As noted above the provisions of section 11 of CPC specifically mandates that, the court shall not try an issue in a subsequent suit between the same parties or parties litigating through them which is identical in earlier suit and has been heard of and adjudicated finally by a competent civil court. The issue No.3 is on record from January 2016, the applicant/defendant No.2 has watched recording of evidence by the court from plaintiffs side and also of defendant No.1(a) till the

time come for cross examination of DW-1 from his side instead of proceeding with the case from said stage has come up with this application. That almost 75% of recording of evidence is completed at this stage it is not desirable to entertain this type of application so as to treat the issue No.3 as preliminary issue. It is well settled law that, an issue regarding application of res-judicata has to be decided along with other issue since it involves the mixed question of law and facts.

12. Thus for the discussion made above I am of the opinion that, the application to treat the issue No.3 as preliminary issue, at this stage, is not maintainable as such it is liable to be rejected. Accordingly, I answer the above point in Negative. In the result I proceed to pass the following;

ORDER

The I.A No.VIII filed by defendant No.2
& 3 U/Sec.151 of CPC is rejected.

[Dictated to the stenographer, the same was typed by her, the transcript thereof is revised and corrected by me and then pronounced in the open Court on this 12th day of August 2022]

**Senior Civil Judge & JMFC.,
Hiriyur.**